In The
Supreme Court of the United States

ALEKSANDR J. STOYANOV
Petitioner

v.

DONALD C. WINTER,
SECRETARY OF THE NAVY; ET. AL.,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Aleksandr J. Stoyanov,
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QUESTION PRESENTED FOR REVIEW

Petitioner seeks review to vacate the appeals court decision, which did not address any issue raised in the Petitioner's Informal Brief, but wrongly dismissed the Petitioner's timely filed appeal from the district court's final judgment and order entered on February 25, 2008. On 11/5/07, Petitioner properly filed Motion to Reconsider the 9/28/07 Order and Amend the Judgment granting Defendants' motion for summary judgment because Petitioner did not receive the 9/28/07 Order until 11/3/07. On 1/18/08, Petitioner also filed Motion for Judgment Against Defendants and for a decision on the 11/5/07 motion. After about four months of silence since 11/3/07, the district court finally mailed Memorandum Opinion and made the entry of the final decision and order on February 25, 2008, when the district court of its own initiative corrected excusable neglect or omission and provided relief from the 9/28/07 Order specifically holding that "Plaintiff filed a timely motion for reconsideration." On March 27, 2008, Plaintiff timely filed Notice of Appeal within 60 days from the final decision of the district court; however, the appeals court wrongly dismissed Petitioner's appeal as untimely. The appeals court decision presents the following question for review:

Whether the time to file an appeal run for all parties in this case from the final decision and order disposing of the Plaintiff's motion for reconsideration and the motion for judgment?

LIST OF PARTIES

ALEKSANDR J. STOYANOV,
Petitioner,

v.

DONALD C. WINTER, Secretary of the Navy;
CHARLES BEHRLE, individually and in his official capacity as Head of the Carderock Division Naval Surface Warfare Center;
GARY M. JEBSEN, individually and in his official capacity as Head of Code 70, Carderock Division Naval Surface Warfare Center;
KEVIN M. WILSON, individually and in his official capacity as Head of Code 74, Carderock Division Naval Surface Warfare Center;
STEPHAN M. FARLEY, individually and in his official capacity as Head of Code 741, Carderock Division Naval Surface Warfare Center;
STEPHAN PETRI individually and in his official capacity as Head of the Carderock Division Naval Surface Warfare Center;
DAVID M. CARON, individually and in his official capacity as Assistant Counsel Code 39, Carderock Division Naval Surface Warfare Center;
Respondents.

CERTIFICATE OF INTEREST

The Petitioner Aleksandr J. Stoyanov certify the following:

1. The full name of every party or amicus represented by me is: None
2. The name of the real party in interest represented by me is: None
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are: None
4. There is no such corporation as listed in paragraph 3
5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are: None

1/12/09 — Date

Aleksandr Stoyanov — Aleksandr Stoyanov

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2. U.S. Court of Appeals for the Fourth Circuit, Docket No. 08-1377, (1:05-cv-02819-AMD) Judgment decided on September 3, 2008. (Appendix p. A2)

3. U.S. Court of Appeals for the Fourth Circuit, Docket No. 08-1377, (1:05-cv-02819-AMD) unpublished opinion. (Appendix p. A3)

4. U.S. District Court Order dated February 25, 2008, Docket No. 05-02819-AMD (Appendix p. A6)

5. U.S. District Court Memorandum Opinion dated February 25, 2008, Docket No. 05-02819-AMD (Appendix p. A7)

6. U.S. District Court Order dated September 28, 2007, Docket No. 05-02819-AMD (Appendix p. A36)

7. Motion to Reconsider the September 28, 2007 Order and Amend the Judgment. (Appendix p. A37)

8. Declaration of Aleksandr J. Stoyanov. (Appendix p. A39).

JURISDICTION

The U.S. Court of Appeals for the Fourth Circuit issued Order denying timely petition for panel rehearing on November 10, 2008. Petitioner Aleksandr Stoyanov submits a petition for a writ of certiorari under this Court's Rule 12.4. The Supreme Court has jurisdiction in exercising its power of review of this matter pursuant to 28 U.S.C. 1253-1254. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTES INVOLVED IN THIS CASE

Age Discrimination in Employment act of 1967, 29 U.S.C. 621 et seq. ("ADEA"); Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e et. seq. ("Title VII"); Whistleblower Protection Act, 5 U.S.C. 2302(b)(8) ("WPA"); 5 U.S.C. §§2301-2302; 42 U.S.C. §1983, 28 U.S.C. §1291.

STATEMENT OF THE CASE

Petitioner Dr. Aleksandr Stoyanov submits a writ of certiorari for the Court's consideration and decision to vacate the appeals court decision and remand the case for a decision on the merits of the case. Petitioner timely filed appeal with the Court of Appeals for the Fourth Circuit because of injustice and erroneous reasons stated in the district court opinion that conflicted with the relevant decisions of this Court and decisions of other appeals courts applied to the facts in this case. The appeals court, however, did not address any issue raised in the Petitioner's Informal Brief, but wrongly dismissed the Petitioner's timely filed appeal from the district court's final judgment and order. Facts presented below support Petitioners' cause as follows:

1) As a last resort for legal remedies, Petitioner appeals to this Court to exercise supervisory power and restore justice. Petitioner has timely exhausted all administrative and legal remedies to recover damages for intentional discrimination, retaliations, and violations of Petitioner's rights, but was denied a jury trial on crucial claims.

2) Petitioner worked for the Navy as a career appointment Scientist in the same RF Technology Branch Code 741 since 1989. On February 4, 2002, Petitioner Dr. Aleksandr Stoyanov and Petitioner's

brother Dr. Yuri Stoyanov filed first EEO discrimination complaints after promotion was denied to the ND-5 Branch Head Interdisciplinary Manager position in Code 741 in the most egregious act of intentional discrimination against the 46 years-old Petitioner (DOB 4/7/1955, born in Russia) when a significantly younger (over 14 years) with far inferior qualifications Defendant Mr. Farley (DOB 5/16/1969, born in Kansas) was fraudulently promoted by manipulating the selection process. The selecting official pre-selected and assigned the 29 years-old Defendant Farley to the position in Code 741 in April 2000 and violating regulations kept him in the acting position for more than 600 days until selection.

3) Petitioner and his brother were also denied promotions and assignments to at least six ND-5 positions, which were filled without any vacancy announcements when other individuals with inferior qualifications were assigned to a position and secretly promoted under pretext of accretion of duties to cover up intentional age discrimination against both the Petitioner and his brother. Petitioner was denied promotion and assignment to at least eleven (11) ND-5 positions while younger employees with inferior qualifications were promoted because of age discrimination against Petitioner.

4) Since February 4, 2002, after Petitioner filed first EEO discrimination complaint, Defendants immediately escalated discrimination and retaliations against both Petitioner and his brother and changed Petitioner's work schedule on the same day as the EEO Counselor contacted Defendants on February 21, 2002, and continued intentional discrimination and retaliations against Petitioner in

order to obfuscate egregious age discrimination, violations of EEO Commission regulations and Federal laws, and to injure Petitioner.

5) In September 2003, the EEOC Administrative Judge found that the agency committed intentional discrimination against the Petitioner in reprisal for prior EEO activity. However, the agency failed to comply with laws and failed to implement the Navy policy of zero tolerance to discrimination. As a result of agency's failure to comply with laws and the Navy policy, Defendants further escalated discrimination and unlawfully removed the Petitioner Dr. Aleksandr Stoyanov from the Scientist position in October 2003.

6) Petitioner filed over twenty additional EEO discrimination complaints, disclosed violations of laws, abuse of authority, violations of the Whistleblower Protection Act through the chain of Navy command, and filed disclosures with the US Office of Special Counsel and appeals with the Merit Systems Protection Board.

7) In 2004, in another EEOC discrimination case, the EEOC Administrative Judge also found that Defendants discriminated against the Petitioner. On March 29, 2005, the EEO Commission Office of Federal Operations (EEOC-OFO) upheld found discrimination against the Petitioner in the first EEOC case and ordered the agency to take appropriate disciplinary action against the responsible management officials. However, agency again failed to comply with laws and to implement the Navy policy of zero tolerance to discrimination.

8) In June 2005, Petitioner timely filed civil action related to the first EEOC case in the United States District Court for the District of Maryland, Case No. RDB-05-1567. Petitioner filed civil action

against the Defendants individually and in their official capacity to recover damages and restore justice because of egregious discrimination and violations of Petitioner's rights.

9) On October 14, 2005, Petitioner timely filed another civil action related to the claims of intentional discrimination, violations of Petitioner's rights, and removal from the Scientist position, Case No. RDB-05-2819. On August 17, 2006, district court Judge Bennett ordered to Stay the Case No. RDB-05-2819 pending resolution of consolidated Civil Case No. RDB-05-1567 and No. RDB-05-1611.

10) On May 9, 2007, district court Judge Bennett ordered the Clerk of the court to place the Case No. RDB-05-2819 on Inactive/Unassigned Docket. On May 25, 2007, Petitioner amended the original complaint. On 15 August 2007, district court Judge Bennett ordered the case 05-2819 to be placed back on the active docket after Judge Bennett denied Petitioner jury trial in the Case No. RDB-05-1567. See also Writ of Certiorari, Case No. 08-0095.

11) For more than a month, Petitioner did not receive from the district court any notice or an order that the case was reassigned from Judge Bennett to Judge Davis and Defendants' Representative Mr. Sippel failed to respond to the Petitioner's amended complaint. On October 26, 2007, as part of a good faith effort Petitioner contacted Mr. Sippel with regard to the Defendants' response to the amended complaint. On October 29, 2007, Mr. Sippel informed Petitioner that district court Judge Davis dismissed the case on September 28, 2007. Petitioner, however, did not receive from the district court any order regarding the decision made by Judge Davis. See Petitioner's affidavit at A39.

12) On October 31, 2007, a clerk of the district court acknowledged that the 9/28/07 Order was not mailed to the Petitioner and explained that Judge Davis personally filed the Order. Apparently no one in the Clerks' office was notified about the 9/28/07 Order.

13) The district court clerk assured Petitioner that a notice would be made in the case on the Docket entries that the 9/28/07 Order was not mailed to the Petitioner. Since September 2007, Petitioner did not know about the 9/28/07 Order issued by Judge Davis because of violations of the district court regulations or negligence by Judge Davis to notify the Clerk's office to mail Petitioner the 9/28/07 Order.

14) On November 5, 2007, Petitioner timely filed Motion to Reconsider the 9/28/07 Order and Amend the Judgment after receiving the 9/28/07 Order on November 3, 2008. The Petitioner's affidavit attached to the November 5, 2007 Motion to Reconsider the 9/28/07 Order and Amend the Judgment showed that the record in this case was deficient and Petitioner respectfully requested continuance to conduct discovery and time to complete discovery essential for this case. The district court failed to make any decision or ruling for about four months until the final decision and order on February 25, 2008.

15) On January 18, 2008, Petitioner also filed Motion for Judgment Against Defendants and for a Decision on November 5, 2007 Motion since Defendants failed to defend and respond timely to the Petitioner's amended complaint.

16) Only on February 25, 2008, after about four months of silence and failure to mail any decision since November 3, 2007, the district court Judge

Davis finally issued Memorandum Opinion and made the entry of the final decision and order by denying all outstanding motions.

17) The district court Judge Davis acknowledged in the Memorandum Opinion: "Plaintiff filed a timely motion for reconsideration, which has been opposed by Defendants". See Appendix A7. On March 27, 2008, Plaintiff timely filed Notice of Appeal within 60 days from the February 25, 2008 final decision and order of the district court.

18) The U.S. Court of Appeals for the Fourth Circuit, however, did not address any issue raised by the Petitioner's appeal, but wrongly dismissed the Petitioner's timely filed appeal from the district court's final decision and order by ruling that "a motion for reconsideration, did not toll the time for filing a notice of appeal of the underlying order because it was not a timely filed Fed. R. Civ. P. 59(e) motion." The appeals court wrongly dismissed Plaintiff's appeal while the district court explicitly held that "Plaintiff filed a timely motion for reconsideration" to provide relief under Fed. R. Civ. P. 60(a) from the 9/28/07 Order and of court's own initiative corrected excusable neglect or omission for failure to timely mail the entry of the 9/28/07 Order to the Petitioner. See Appendix at A7. The appeals court decision also contradicted this Court's decisions that recognized the "unique circumstances" in similar cases. See *Thompson v. INS*, 375 U.S. 384 (1964), *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962).

19) The appeals court unpublished decision call for an exercise of this Court's supervisory power to restore justice, vacate the appeals court decision, and remand the case to the Court of Appeals for the

Fourth Circuit to address the merits of the issues raised by the Petitioner's appeal.

ARGUMENTS FOR ALLOWANCE OF THE WRIT

PETITIONER TIMELY FILED APPEAL FROM THE FINAL JUDGMENT OF THE DISTRICT COURT

Petitioner presents compelling reasons to grant petition for a writ of certiorari based on the relevant decisions of this Court. In *Van Cuwenbeghe v. Braid*, 486 U.S. 517, 521 (1988), this Court held that a final judgment is generally regarded as "a decision by the district court that 'ends the litigation on the merits and leaves noting for the court to do but execute the judgment'". Petitioner properly requested reconsideration after receiving the 9/28/07 Order granting Defendants' motion to dismiss or for summary judgment on fewer than all claims. The affidavit attached to the Plaintiff's Motion to Reconsider the 9/28/07 Order and Amend the Judgment showed that the record in this case was deficient and in the motion Petitioner requested a continuance to complete discovery because during administrative process discovery was inadequate and Petitioner specifically quoted the Fed. Rule Civ. P. 56(f). However, the panel decision of the appeals court misconstrued the Plaintiff's motion for reconsideration as a Fed. Rule Civ. P. 60(b) motion contrary to the evidence that Plaintiff's Motion to Reconsider the 9/28/07 Order and Amend the Judgment explicitly requested continuance to conduct discovery. See Appendix at A5 and A39.

In addition, the appeals court ignored the fact that Petitioner requested the district court to wave the time limit to file motion for reconsideration

because the requirement to file motion for reconsideration no later than 10 days after entry of the order would be unrealistic where Petitioner by definition cannot request reconsideration of an order he did not know existed. The appeals court finding that

> "Stoyanov's motion for reconsideration, which was filed more than one month after the district court's order granting Defendants' motion to dismiss and asked that district court extend Stoyanov's time to file a motion for reconsideration, did not toll the time for filing a notice of appeal of the underlying order because it was not a timely filed Fed. R. Civ. P. 59(e) motion,"

was clearly inconsistent with substantial justice and the district court's own initiative holding that "Plaintiff filed a timely motion for reconsideration" to provide relief under Fed. R. Civ. P. 60(a). The appeals court decision also contradicted this Court's decisions that the court of appeals had jurisdiction in light of the "unique circumstances" of the case. See *Thompson v. INS*, 375 U.S. 384 (1964), *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962).

In fact, the district court Judge Davies waved the time limit and, to correct excusable neglect or omission to timely mail the entry of the 9/28/07 Order to the Petitioner, provided relief under Fed. R. Civ. P. 60(a) from the 9/28/07 Order specifically finding in the Memorandum Opinion: "Plaintiff filed a timely motion for reconsideration, which has been opposed by Defendants". See Appendix A7. The district court ruled on the Plaintiff's Motion to Reconsider the 9/28/07 Order and Amend the

Judgment as timely filed, although he did not explicitly identify the Fed. R. Civ. P. 60(a) and 61, which specifically stated in part that "refusal to take such action appears to the court inconsistent with substantial justice." On February 25, 2008, Judge Davis explicitly stated in the Memorandum Opinion at A35: "Having reviewed Plaintiff's arguments in support of his motion for reconsideration, the motion shall be denied. An Order follows." Moreover, the entry of the February 25, 2008 Order was a "final decision of the district court" under Title 28 U.S.C. §1291 providing for appeal to the court of appeals. The February 25, 2008 Order declared:

> "[f]or the reasons stated in the forgoing Memorandum Opinion, it is this 25th day of February 2008, by the United States District Court for the District of Maryland ORDERED: (1) Plaintiff's motions for reconsideration, for judgment, and to compel (Paper Nos. 37, 40, 41, and 42) are DENIED;"

which explicitly made the decision of the district court final as regarded by this Court in *Van Cuwenbeghe v. Braid*, 486 U.S. 517, 521 (1988). The district court ended litigation on the merits with the final Order for the reasons stated in the Memorandum Opinion that was filed on February 25, 2008. The appeals court, however, ignored these facts erroneously finding that the "Stoyanov's notice of appeal, filed more than sixty days after the district court entered its order granting Defendants' motion to dismiss, was untimely filed, regardless of when Stoyanov received notice of entry of the district court's order. See Fed. R. Civ. P. 77(d)," and clearly contradicted this Court's decisions in *Van Cuwenbeghe* and *Thompson*. In addition, the

Memorandum Opinion "shortly to be filed" with the 9/28/07 Order was not filed for more than 117 days until the February 25, 2008 final Order. And Petitioner did not receive a decision on the Motion to Reconsider the 9/28/07 Order and Amend the Judgment from the district court for more than 80 days until the February 25, 2008 final Order.

On November 30, 2007, Petitioner also filed Motion to Compel Defendants to Certify Under Penalty of Perjury the Content of Defendants' Correspondence (paper 40) and Motion to Compel Defendants to Send Confirmation of Defendants' Correspondence (paper 41), which urged the district court to "disregard any Defendants' motion or letter that were not received by the Plaintiff because of the precedents and to prevent potential problems of timely communications with the district court because of the district court continued silence and failure to mail Petitioner any decision. On January 18, 2008, Petitioner also filed Motion for Judgment Against Defendants and for a Decision on November 5, 2007 Motion. In the Plaintiff's Motion for Judgment Against Defendants, Plaintiff respectfully requested final judgment against the Defendants based on the facts that Defendants failed to respond to the Plaintiff's amended Complaint, there was no just reason for delay, and expressed evidence presented in the Plaintiff's complaint clearly established right to relief pleaded and requested.

Only on February 25, 2008, the district court entered final decision and order ending the litigation on the merits. Accordingly, the time to file an appeal for all parties run from the entry of the February 25, 2008 final decision and order. Under the Fed. R. App. P. 4(a)(1)(B), a party to a lawsuit involving the

United States must file a notice of appeal within 60 days after a judgment or order appealed from is entered. On March 27, 2008, Petitioner timely filed Notice of Appeal within 60 days from the February 25, 2008 final decision of the district court. Based on the facts identified above, Petitioner established compelling reasons to grant petition for a writ of certiorari, vacate the appeals court decision, and remand the case to the Court of Appeals for the Fourth Circuit to address the merits of the issues raised by the Petitioner's appeal.

"UNIQUE CIRCUMSTANCES" DOCTRINE

The appeals court wrongly dismissed Petitioner's appeal by referring to its own decision in *Panhorst v. United States,* 241 F.3d 367, 369-73 (4th Cir. 2001) and finding that motion for reconsideration of the district court's order granting Defendants' motion to dismiss or for summary judgment "did not toll the time for filing a notice of appeal of the underlying order" in spite of the acknowledgment in *Panhorst,* 241 F.3d 370:

> "We would thus have jurisdiction over this appeal only if the "unique circumstances" doctrine cured the jurisdictional defect caused by appellants' tardy notice of appeal."

Unlike *Panhorst* who knew that the district court entered the order granting summary judgment, but filed a motion for rehearing and reconsideration under Fed. R. Civ. P. 59 thirteen days after the entry of the summary judgment order, Petitioner, however, did not know that the order existed for more than a month and thus by definition could not request reconsideration of the district court's order within the ten days from the entry of the order. In addition, Petitioner did not receive a decision on the Motion to

Reconsider the 9/28/07 Order and Amend the Judgment from the district court for more than 80 days until the February 25, 2008 final Order that provided relief from the 9/28/07 Order under Fed. R. Civ. P. 60(a) to correct excusable neglect or omissions to timely mail to the Petitioner the entry of the 9/28/07 Order. Although, the appeals court acknowledged in *Panhorst,* 241 F.3d at 372: "we must assume that the unique circumstances doctrine remains good law," nevertheless, the appeals court did not consider the obvious great hardship and the unique circumstances in the Petitioner's case because of the district court's failure to timely mail the entry of the 9/28/07 Order to the Petitioner. Petitioner also relied on the district court's finding that the motion for reconsideration was timely filed motion. Further, the district court had authority under the Fed. R. Civ. P. 60(a) and of its own initiative to provide relief from the 9/28/07 Order and corrected mistakes in this case arising from excusable neglect or failure to timely mail the entry of the 9/28/07 Order to the Petitioner by finding the Motion to Reconsider the 9/28/07 Order and Amend the Judgment as a timely filed motion after reviewing Plaintiff's arguments in support of his motion as was evident in the district court's February 25, 2008 final decision and order from which Petitioner timely filed Notice of Appeal. See Appendix at A7 and A35. Moreover, the unique circumstances doctrine in this case fit within the exception recognized by this Court holding that the court of appeals had jurisdiction and should have given greater deference to the "excusable neglect or good cause." See *Harris.*

Consequently, Petitioner established compelling reasons for this Court to grant petition for a writ of certiorari and vacate the appeals court decision

because the court of appeals had jurisdiction in light of the "unique circumstances" of the case.

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

1/12/09
Date

Aleksandr Stoyanov
Aleksandr Stoyanov

APPENDIX

FILED: November 10, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 08—1377
(1: 05—cv—02819—AMD)

ALEKSANDR J. STOYANOV,
Plaintiff — Appellant

v.

GORDON R. ENGLAND, Secretary of the Navy; CHARLES BEHRLE, Individually and in his Official Capacity as the Head of the Carderock Division; GARY H. JEBSEN, Individually and in his Official Capacity as the Head of Code 70; KEVIN WILSON, Individually and in his Official Capacity as the Head of Code 74; STEPHAN N. FARLEY, Individually and in his Official Capacity of Code 741; DAVID CARON, Individually and in his Official Capacity as Assistant Counsel Code 39; STEPHAN W. PETRI,
Defendants — Appellees

ORDER

The Court denies the petition for rehearing.

Entered at the direction of the panel: Judge Michael, Judge Traxler, and Judge King.

For the Court
/s/ Patricia S. Connor, Clerk

FILED: September 3, 2008

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 08—1377
(1: 05-cv--02819---AMD)

ALEKSANDR J, STOYANOV,
Plaintiff - Appellant

v.

CORDON R. ENCLAND, Secretary of the Navy; CHARLES BEHRLE, individually and in his Official Capacity as the Head of the Carderock Division; GARY N. JEBSEN, Individually and in his Official Capacity as the Head of Code 70; KEVIN WILSON, Individually and in his Official Capacity as the Head of Code 74; STEPHAN N. FARLEY, individually and in his Official Capacity of Code 741; DAVID CARON, Individually and in his Official Capacity as Assistant Counsel Code 39; STEPHAN N. PETRI,
Defendants – Appellees

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed in part. The appeal is dismissed in part.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ Patricia S. Connor, Cleric

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 08-1377

ALEKSANDR J. STOYANOV,
Plaintiff - Appellant,

v.

GORDON R. ENGLAND, Secretary of the Navy; CHARLES BEHRLE, Individually and in his Official Capacity as the Head of the Carderock Division; GARY M. JEBSEN, Individually and in his Official Capacity as the Head of Code 70; KEVIN WILSON, Individually and in his Official Capacity as the Head of Code 74; STEPHAN 1W, FARLEY, Individually and in his Official Capacity as the Head of Code 741; DAVID CAROM, Individually and in his Official Capacity as Assistant Counsel Code 39; STEPHAN W. PETRI,
Defendants - Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Andre M. Davis, District Judge.(1: 05-cv-02819-AMD)

Submitted: July 29, 2008 Decided: September 3, 2008

Before MICHAEL, TRAXLER, and KING, Circuit Judges.

Dismissed in part; affirmed in part by unpublished per curiam opinion.

Aleksandr J. Stoyanov, Appellant Pro Se. John Walter Sippel, Jr., Assistant United States Attorney, Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Aleksandr J. Stoyanov appeals the district court's order dismissing his claims under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (2000), the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621 to 634 (2000), the Whistleblower Protection Act, 5 U.S.C. §§ 1214, 1221 and 2302 (2000), and various state law tort claims, as well as its order denying his motions for reconsideration, for judgment, and to compel certification of the content of Defendants' correspondence. We dismiss Stoyanov's appeal in part because he failed to timely appeal the district court's order dismissing his claims, and affirm the district court's order denying his motions.

When the United States or its officer or agency is a party to a civil suit, parties are accorded sixty days from the day judgment is entered to file a notice of appeal, see Fed. R. App. P. 4 (a) (1) (B), unless the district court extends the appeal period under Fed. R. App. P. 4(a) (5), or reopens the appeal period under Fed. R. App. P. 4(a) (6). This appeal period is "mandatory and jurisdictional." Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978) (internal quotation marks and citations omitted). Accord Bowles V. Russell, 127 S. Ct. 2360 (2007). Stoyanov's notice of

appeal, filed more than sixty days after the district court entered its order granting Defendants' motion to dismiss, was untimely filed, regardless of when Stoyanov received notice of entry of the district court's order, See Fed. R. Civ. P. 77 (d).

Moreover, we find that Stoyanov's motion for reconsideration, which was filed more than one month after the district court's order granting Defendants' motion to dismiss and asked that the district court extend Stoyanov's time to file a motion for reconsideration, did not toll the time for filing a notice of appeal of the underlying order because it was not a timely filed Fed. IL Civ, P. 59(e) motion. See Panhorst v. United States, 241 F.3d 367, 369-73 (4th Cir. 2001). Although the district court did not explicitly construe Stoyanov's motion for reconsideration as a Fed. R. Civ. P. 60(b) motion, we nonetheless find that Stoyanov's motion failed to establish he was entitled to Rule 60(b) relief.* See Fed. R. Civ. P. 60(b).

Based on the foregoing, we dismiss Stoyanov's appeal of the district court's order granting Defendants' motion to dismiss and affirm the district court's denial of Stoyanov's motions for reconsideration, for judgment, and to compel. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED IN PART;
AFFIRMED IN PART

*Because Stoyanov's Rule 60(b) motion was not the functional equivalent of a notice of appeal, see Fed. R. App. P. 3, we decline to construe the motion as a notice of appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALEKSANDR J. STOYANOY,
Plaintiff

v. Civil No. AMD 05-2819

GORDON R. ENGLAND, SECRETARY
OF THE NAVY, et al.,
Defendants

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 25th day of February, 2008, by the United States District Court for the District of Maryland ORDERED:

(1) Plaintiffs motions for reconsideration, for judgment, and to compel (Paper Nos. 37, 40, 41, and 42) are DENIED;

(2) The Clerk shall TRANSMIT a copy of this Order and the foregoing Memorandum Opinion to plaintiff pro *se*.

ANDRE M. DAVIS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALEKSANDR J. STOYANOV,
Plaintiff

V. Civil
No. AMD 05-2819

GORDON R. ENGLAND, SECRETARY
OF THE NAVY, et al,
Defendants

MEMORANDUM OPINION

In this pro se federal employment discrimination action, the court entered an order on September 28, 2007, granting Defendants' motion to dismiss or in the alternative for summary judgment, stating that its opinion setting forth the reasons for that order would be forthcoming. Thereafter, Plaintiff filed a timely motion for reconsideration, which has been opposed by Defendants. For the reasons set forth within, the court granted the Defendants' dispositive motion and shall deny the motion for reconsideration.

I.

A full account of the factual and procedural background of this and a host of related discrimination cases instituted by plaintiff are described in a Memorandum Opinion issued by Judge Bennett on July 25, 2006. *See Stoyanov v. Winter*, No. 05-1567, slip op. at 2—5 (D. Md. Jul. 25, 2006). Plaintiff Aleksandr J. Stoyanov was born in Russia on April 7,

1955, and became a United States citizen in 1984. *Id.* at 2. In 1989, Plaintiff began working as a scientist for the Department of the Navy's Naval Surface Warfare Center, Carderock Division ("NSWCCD"), in West Bethesda, Maryland. *Id.*

In 2002, Plaintiff's supervisors were Stephan Farley, Kevin Wilson, and Gary Jebsen; the leadership of the Carderock Division included Stephan Petri and Charles Behrle. Plaintiff named each of these individuals and Assistant Counsel to NSWCCD, David Caron, as Defendants in this matter. In February 2002, Plaintiff sought equal employment opportunity counseling. *Stoyanov,* No. 05-1567, slip op. at 3. A month later, Plaintiff (and his brother, as well) filed internal formal complaints of discrimination against the Navy. *Id.* Thereafter, "[a]n investigation was commenced, discovery was conducted, and eventually dispositive motions were filed." *Id.* at 3—4.

During the administrative proceedings, Plaintiff filed a Motion to Compel the Navy to provide him more than two hours per week of official time to work on his EEO complaints. (Def's Mem. Supp. Mot. Dismiss Ex. 1, Ex. F-23 at 212—14). Oft March 20, 2003, Administrative Judge David Norken denied Plaintiff's motion and issued an order finding that "two hours per week is reasonable for preparation time on this case . . . [and Plaintiff] shall not work on his case at work outside of these approved limits." *Id,* In March 2003, Defendant Farley instructed Plaintiff that he was permitted to use the government's facilities to work on his EEO complaints during specific time periods that totaled two hours per week.[1]

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[1] Defendant Farley instructed Plaintiff, via email, that he "was permitted to use the government's computer, copier or fax to work

On June 19, 2003, Judge Norken issued a preliminary bench decision rejecting most of Plaintiff's and his brother's EEO claims. *Stoyanov,* No. 05-1567, slip op. at 4. In August 2003, Plaintiff asked Defendant Farley for more official time to work on his EEO complaints. (Def.'s Mem. Supp. Mot. Dismiss :3). After Defendant Farley rejected Plaintiff's request for more official time to work on his EEO matters, Plaintiff called Defendant Farley "a liar and a perjurer." *Id.* In September 2003, Plaintiff violated Defendant Farley's directive by working on his EEO matters outside of the allotted time periods on two separate occasions,[2] *Id.* at *4—5.*

In September 2003, Judge Norken issued an Order Entering Judgment in favor of the Plaintiff for one claim and in favor of the Department of the Navy with respect to all other claims.[3] *Stoyanov,* No. 05-1567, slip op. at 4. Additionally, Judge Norken ordered that Plaintiff "not make any accusations of criminal conduct, fraud or tampering with evidence against [Assistant Counsel to NSWCCD David] Caron in any motion, opposition, reply, surreply or even any rebuttal letter." (Deli's Mem. Supp. Mot. Ex. 3). After

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on his EEO complaints during the times previously allotted for EEO work (10-11 am on Tuesdays and Thursdays)." (Def's Mem. Supp. Mot. Dismiss Ex. 3).

[2] On September 14, 2003, at 6:30 p. m., Defendant Fancy asked Plaintiff to leave the office after Farley noticed Plaintiff making copies of his EEO documents. (Def's Mem. Supp. Mot. Dismiss Ex. 4). On September 22, 2003, at 6:15 p.m. Defendant Farley asked Plaintiff to leave the office after he noticed Plaintiff working on his EEO complaints. *Id.* at 4—5.

[3] Plaintiff "noted an appeal to the Equal Employment Opportunity Commission's Office of Federal Operation ("EEOC-OFO")." *Stoyanov,* No. 05-1567, slip op. at 4. The EEOC-OFO affirmed Judge Norken's final order in March 2005. *Id.* 4--5.

receiving Judge Norken's Order, Plaintiff submitted a letter to Judge Norken alleging that Defendant Caron "systematically and willfully misrepresented facts in order to receive ruling in favor of the agency" and "persisted with intentional misrepresentation of facts," and thereby violated Judge Norken's September Order. (Deli's Mem. Supp. Mot. Dismiss Ex. 4).

On October 6, 2003, Plaintiff received a Notice of Proposed Removal based on his violations of Defendant Farley's directive and Judge Nonken's September Order, and his "record of prior disciplinary action against him." *Id.* at 6; Ex. 1, Ex. F-2 at 60—63. After Plaintiff submitted a response to the Notice of Proposed Removal, the Navy issued a Decision of Proposed Removal and Plaintiff was terminated from his position at NSWCCD on November 18, 2003. *Id* at 6.

II.

After his termination, Plaintiff filed a formal complaint of employment discrimination with the Navy in January 2004. *Id.* Ex. 1, Ex. A. In September 2004, before the Navy issued a Final Agency Decision, Plaintiff filed an appeal with the Merit Systems Protection Board ("MSPB"). *Id* Ex. 2. The MSPB conducted a hearing regarding Plaintiff's appeal and, in December 2004, issued an Initial Decision affirming Plaintiff's removal. *Id.* Ex. 8. Plaintiff was denied his Petition for Review of the MSPB's Initial Decision in August 2005. *Id.* Ex. 9. Thereafter, Plaintiff sought review of the MSPB's Final Order with the EEOC-OFO, which affirmed MSPB's Final Order in October 2005. *Id.* at 7.

Meanwhile, on June 10, 2005, Plaintiff and his

brother filed a Complaint for employment discrimination and other tort claims against the Navy with this Court. *Id.* at 5. On October 14, 2005, Plaintiff filed a Complaint for employment discrimination, whistleblower protection, and other tort claims against Plaintiff's former supervisors and Assistant Counsel to NSWCCD, David Caron ("Caron"). (Def. 's Mem. Supp. Mot. Dismiss 2—3; P1's Compl. ¶1). Thereafter, Plaintiff and has brother filed several other complaints against the Navy. *See Stoyanov v. Winter,* 2007 WL 2359771, at *1*3 (D. Md. Aug. 15, 2007) (Bennett, J.). In total, Plaintiff and his brother have filed eleven separate civil actions in this Court. *Id.* at *2. Judge Bennett determined that the Plaintiff's and his brother's civil actions "are vexatious and place a burden upon this Court that is unfair to the numerous other *pro se* litigations with whom this Court must share its time." *Id.* Therefore, he "entered a series of orders limiting Plaintiffs to one active assigned civil case [at a time]." *Id.*

Prior to the September 28, 2007, Order in this case, Judge Bennett had disposed of two of the eleven civil actions filed by Plaintiff and his brother. *Id* at 22. The present action was filed by Plaintiff on October 14, 2005. Plaintiff claims that the Defendants violated Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act of 1967, the Whistleblower Protection Act of 1989, and alleges other tort claims.

III.

Defendants seek dismissal of this action, *inter alia,* for lack of subject matter jurisdiction, lack of personal jurisdiction, and for failure to state a claim upon which relief can be granted. Resolution of a

motion to dismiss for lack of subject matter jurisdiction "takes precedence. . . [because] without jurisdiction, the court has no power to rule on the validity of a claim." *E.g., Verizon Marylalnd Inc. v. RCN Telecom Services, Inc.*, 232 F. Supp.2d 539, 545 (D. Md. 2002) (Smalkin, J.) (citing *Steel Co. v. Citizens for a Better Env* 'I, 523 U.S. 83, 94-95 (1998)).

The plaintiff has the burden of proving that a court has subject matter jurisdiction over the plaintiff's claims. *E.g., Adams v. Bain,* 697 F.2d 1213, 1219 (4th Cir. 1982); *Richmond, Fredericksburg & Potomac R. Co. v. United States,* 945 F.2d 765, 768 (4th Cir. 1991). If a defendant challenges subject matter jurisdiction, "the district count is to regard the pleading as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Richmond, Fredericksburg & Potomac R. Co.,* 945 F.2d at 768. A district court should grant the motion to dismiss for lack of subject matter jurisdiction "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.* at 768.

When a defendant challenges a court's power to exercise personal jurisdiction over a nonresident defendant under Fed. R. Civ. P. 12(b)(2), "the jurisdictional question is to be resolved by the judge, with the burden on the plaintiff ultimately to prove grounds for jurisdiction by a preponderance of the evidence." *Strong Pharmaceutical Lab. LLC, v. Trademark Cosmetics, Inc.,* 2006 U.S. Dist. LEXIS 52574 at *8 (D. Md. 2006) (Bennett, J.) (quoting *Careflrst of Maryland, Inc. v. Careflrst Pregnancy Centers, Inc.,* 334 F.3d 390,396 (4th Cir. 2003) (citation omitted). The plaintiff must make a prima facie

showing of personal jurisdiction based on the complaint, affidavits and discovery materials. *Id.* "In determining whether the plaintiff has made a prima facie case of personal jurisdiction, the court 'must draw all reasonable inferences arising from the proof, and resolve all factual disputes, in the plaintiff's favor." *Id* (quoting *Mylan Lab., Inc. v. Akzo, N. V.,* 2 F.3d 56, 59-40 (4th Cm. 1993)).

When a defendant seeks to dismiss a plaintiff's action for failure to state a claim under Fed. R. Civ. P. 12(b)(6), "the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff." *Mylan Lab., Inc. v. Matkari,* 7 F.3d 1130, 1134 (4th Cir. 1994)). The purpose of a Rule I 2(b)(6) motion is "to test the legal sufficiency of the statement of the claim." *Simmons v. Shalala,* 946 F. Supp. 415,417 (D. Md. 1996) (Nickerson, J.). A Rule 12(b)(6) motion "should only be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief' *Migdal v. Rowe Price-Fleming Int'l Inc.,* 248 F.3d 321, 325 (4th Cir. 2001) (citing *Edwards v. City of Goldsboro,* 178 F.3d 231, 244 (4th Cm. 1999)).

As to some claims, Defendants seek summary judgment. Under Fed. R. Civ. P. *56©,* summary judgment is appropriate where "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." In considering a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249

(1986). A genuine issue for trial exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving panty." *Id* at 248. Therefore, in determining 'whether there is genuine issue as to any material fact, "the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Id.* at 252. During this inquiry, a court must consider the facts and all reasonable inferences in the light more favorable to the nonmoving party. *E.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

If the moving party "established the absence of any genuine issue of material fact, the opposing party has the obligation to present some type of evidence to the court demonstrating the existence of an issue of fact ."*Pension Ben. Guar. Corp. v. Beverly,* 404 F.3d 243,246—46 (4th Cir. 2005) (citing Pine *Ridge Coal Co. v. Local 8377, UMW,* 187 F.3d 415,422(4th Cir. 1999)). Additionally, Rule 56(e) requires that the nonmoving party respond to a motion for summary judgment by providing affidavits that "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Moreover, the "existence of a mere 'scintilla' of evidence in support of the nonmoving party's case is insufficient to preclude an order granting summary judgment." *Wang v. Metropolitan Life Ins. Co.,* 334 F. Supp. 2d 853, 861 (citing *Anderson,* 477 U.S. at 252). This Court and the Fourth Circuit have emphasized that courts have an "affirmative obligation. . . to prevent factually unsupported claims and defenses from proceeding to trial" *Drewitt v. Pratt,* 999 F.2d 774, 778—79 (4th Cir. 1993) (quoting *Felty v. Graves-Humphreys Co.,* 818

F.2d 1126, 1128 (4th Cir. 1987)).

IV

Plaintiff's purported claims include: (A) alleged violations of Title VII of the 1964 Civil Rights Act; (B) alleged violations of the Age Discrimination in Employment Act (ADEA); © alleged violations of the Whistleblower Protection Act; (D) other tort claims, including conspiracy, aiding and abetting, intentional infliction of emotional distress, fraud and misrepresentations, and malicious abuse of process. *(See* Pl's Compl., ¶¶ 144—85). Plaintiff demands in excess of $35,000,000 in connection with the following claims:

Count	Claim
I	Violation of Title VII (National Origin]: Defendants Gordon R. England, Secretary of the Navy (the "Secretary of the Navy"), Charles Behrle ("Behrle"), Gary M. Jebsen ("Jebsen"), Kevin M. Wilson "Wilson"), Stephen M. Fancy ("Fancy"), David Caron ("Caron"), and ; Stephen Petri ("Petri") discriminated against Plaintiff on the basis of national origin in violation of Title VII. (Pl.'s Compl. ¶116—122).
II	Violation of Title VII (Retaliation): Defendants Behrle and Petri in conspiracy with Defendants Jebsen, Wilson, Farley, and Caron, retaliated against Plaintiff for participating in EEO discrimination complaint activity in violation of Title VII. *(Id* ¶ 123—26).
III	Violation of the ADEA (Age): Defendants discriminated against Plaintiff on the

	basis of age in violation of the ADEA. *('Id.* ¶ 127—30).
IV	Violation of the Whistleblower Protection Act: Defendants discharged Plaintiff on account of his whistleblowing activities. (¶131—134).
V	Violation of the Human Rights Law: Defendants Petri, Behrle, Jebsen, Wilson, Fancy, and Caron discriminated against Plaintiff "in violation if his right to equal employment as protected by the Human Rights Law 296 et. *seq.*" (¶ 135—138).
vi	Conspiracy: Defendants conspired to discriminate against Plaintiff on he basis of national origin, age, and retaliation for participating in EEO complaint activity and whistleblowing activities. *(Id.* ¶IJ 139—143).,.
vii	Aiding and Abetting: Each Defendant has aided and abetted the unlawful discriminatory conduct alleged in Counts I—VI. *(Id* ¶144—148).
viii	Obstruction of Process: Defendants Petri, Behrle, Jebsen, Wilson, Farley, and Caron "obstructed and impeded official processes in violation of 18 U.S.C. 1512" in connection with the discriminatory conduct alleged in previous counts. *(Id.* ¶149—151).
IX	Abuse of Administrative Power: Defendants Petri, Behrle, Jebsen, Wilson, Farley, and Caron "misused and interfered with administrative processes" in connection with the discriminatory conduct alleged in previous counts. *ld_*¶

	152—154).
X	Intentional Infliction of Emotional Distress: Defendants Petri, Behrle, Jebsen, Wilson, Farley, and Caron "aggravated harassment" and willfully subjected Plaintiff to emotional distress by engaging in the discriminatory conduct alleged in previous counts. *(Id ¶11 155—157).*
XI	Fraud and Misrepresentations: Defendants Jebsen, Wilson, Farley, and Caron "used intentional misrepresentation to discriminate against" Plaintiff and engaged in fraudulent conduct in connection with the discriminatory and retaliatory conduct alleged in previous counts. *(Id* ¶158—166')
XII	Obstruction of Justice: Defendant Canon "unlawfully, willfully, and knowingly, corruptly influenced, obstructed and impeded, and endeavored to influence, obstruct and impede the due and proper administration of the law" in connection with the discriminatory and retaliatory conduct alleged in previous counts. *Id* ¶167—172).
XIII	Malicious Abuse of Process: Defendants "failed to maintain a proper system for immediate resolution of intentional discrimination" and 'maliciously and intentionally abused supervisory position[s] and disciplinary process[es]" by engaging in the discriminatory conduct alleged in previous counts. (*Id.* ¶ 173—

	180).

A.

Defendants contend that This Court lacks jurisdiction over the individual federal employees named as defendants in this action, including Secretary of the Navy Gordon England, Charles Behrle, Gary M. Jebsen, Kevin M. Wilson, Stephen M. Farley, David Caron and Stephen Petri. (Def's Mem. Supp. Mot. 9—10). Defendants move to dismiss these defendants with respect to Plaintiff's Title VII claims and substitute the United States in their place with respect to Plaintiff's tort claims. *Id.*

Title VII prohibits employment discrimination claims against individual federal employees. *See, e.g.*, 42 U.S.C. § 2000e- 1 6© (requiring a plaintiff who files a civil action for employment discrimination to name the appropriate head of the department, agency, or unit as the defendant); *Newbold v. United States Postal Serv.*, 614 F.2d 46, 47 (5th Cir. 1980) (dismissing Title VII claims against individual federal employee), *ceri. denied,* 449 U.S. 878 (1980). Additionally, the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.* ("FTCA") shields a federal employee from liability for a "negligent or wrongful act or omission while acting within the scope of his [or her] office or employment." 28 U.S.C. § 2679(b)(l); *see also Jamison v. Wiley,* 14 F.3d 222, 227 (4th Cir. 1994). Upon certification of the United States Attorney (acting on behalf of the Attorney General) that a defendant federal employee was acting within scope of his or her employment at the time of the incident out of which the plaintiff's claim arose, the United States is substituted as the defendant and the plaintiff's only

route of recovery is through the FTCA. 28 U.S.C. § 2679(d)(T): *see also Chin v. Wilhelm*, 291 F. Supp. 2d 400, 403 (D. Md. 2003) (Blake, J.) In this action, the Office of the United States Attorney for the District of Maryland has certified that Behrle, Jebsen, Wilson, Farley, Caron, and Petri were acting within the scope of their employment at the time of the alleged tortious acts. *(See* Def.s' Mem. Supp. Mot, Ex. 11).

Plaintiff claims that this Court has jurisdiction over Defendants Behrle, Jebsen, Wilson, Farley, Caron, and Petri under 42 U.S.C. § 1983 because Defendants were "acting under color of Federal law to intentionally deprive Plaintiff of his rights, privileges on conditions secured by the Constitution and laws." (P1.'s Opp'n 5). Plaintiffs claim fails for two reasons. First, Plaintiff does not assert a cause of action under § 1983 in his Complaint. Nor could he, as that statute applies to actions taken under color of state law. Second, Plaintiff cannot draw on § 1983 to support his claims against defendants because Title VII and the ADEA are the exclusive remedies available to federal employees alleging employment discrimination claims based on national origin, retaliation, and age. *Brown v. General Ser's. Admin.*, 425 U.S. 820, 829 (1976) (finding that Title VII "create[s] an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination"). Accordingly, these purported claims are dismissed for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).[4] Additionally, the United States is substituted

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[4] *See Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1245 n. 11(2006) (describing a federal statute that limits causes of actions to specific defendants as "jurisdiction"); 42 U.S.C. § 2000e-16(c) (requiring that a federal employee plaintiff name the appropriate

as defendant in respect to Plaintiff's ostensible tort claims (Counts VI—VII, X—XI, & XIII) pursuant to 28 U.S.C. § 2679(d)(1).[5]

B.

Defendants assert that Plaintiff's tort claims should be dismissed for two reasons. First, Defendants contend that this Court lacks subject matter jurisdiction over the tort claims because Plaintiff failed to exhaust the administrative remedies available to him under the FTCA. (Def's Mem. Supp. Mot. 11); *see, e.g.*, 28 U.S.C. § 2675(a)(requiring that a plaintiff file an administrative claim to the appropriate Federal agency before filing a claim against the United States); *Henderson v. United States*, 785 F.2d 121, 123 (4th Cir. 1986) ("[T]he requirement of filing an administrative claim is jurisdictional and may not be waived."); *Plyler v. United States*, 900 F.2d 41, 42—43 (4th Cm. 1990) (same). Second, Defendants contend that Plaintiff's intentional tort claims (intentional infliction of emotional distress, fraud and misrepresentation, and malicious abuse of process) should be dismissed because the United States and its officers have not waived immunity with respect to these claims. (Def's Mem. Supp. Mot. *1t);see, e.g.*, *Tinch v. United States*, 189 F. Supp. 2d3l3, 3l7(D. Md. 2002) (Chasanow, J.) ("The United States, and its

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head of the department, agency, or unit as the defendant in an employment discrimination action).

[5] "Upon certification. . . that the defendant employee was acting within the scope of his *[]* employment at the time of the incident out of which the claim arose, any civil action commenced upon such claim shall be. . . against the United States. . . and the United States shall be substituted as the panty defendant." 28 U.S.C. § 2679(d)(1).

officers, are presumed to be immune to suit, unless they have expressly waived immunity.") (citations omitted); *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.") (citations omitted). Defendants note that the FTCA's limited waiver of sovereign immunity does not apply to any claim arising out of abuse of process and misrepresentation.[6] (Def's Mem. Supp. Mot. 11); 28 U.S.C. § 2680(h); *see also, Tinch*, 189 F. Supp. 2d at 317 ("[S]overeign immunity has not been waived under the FTCA, § 26 80(h), for the torts of negligence on intentional infliction of emotional distress. . . .").

In response to Defendants' exhaustion argument, Plaintiff asserts the he satisfied the requirement that an administrative claim be filed before initiating a suit under the FTCA by filing several EEO discrimination complaints.[7] *(See* Pl.'s Comp. 1117—28). This

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[6] The FTCA does not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. . ." 28 U.S.C. § 2680(h)

[7] *See, e.g.*, Pl. 's AfL ¶ 39 ("On February 4, 2002, I filed [illegible]st EEO discrimination complaint... .); Pl.'s Aff. ¶ 61 ("I have filed specific EEO discrimination claims with the EEO office since February 2002 as related to the escalation of discrimination."); Pl.'s Opp'n p. 6 ("Plaintiff and his brother filed over twenty EEO discrimination complaints each, reported violation of laws, abuse of authority, fraud and exposed Defendants' criminal conduct and presented claims in motions and letters to the EEO Commission, Navy officials, and Office of Special Counsel.. . Pl.'s Aff. ¶ 45 ("My brother and I reported prohibited personnel actions and fraud committed by agency officials Mr. King, Mr. Fancy, Mr. Caron and others to the Navy administration EEO Chief and Commander Captain S. Petri, to the Commander of NAVSEA Admiral Balisle, to the Secretary of the Navy Mr. Gordon England and to the Secretary of Defense Mr. D. Rumsfeld"); P1. 's

contention is unavailing. Defendants correctly assert that Plaintiff "failed to present his tort claims through the proper administrative channels, i.e. by submitting an SF-95 form to the Navy." *Id* The Court concludes that no material jurisdictional facts are in dispute and that Defendants should prevail as a matter of law. *See, e.g. Richmond v. United States, 945* F.2d at 768. Plainly, as well, any intentional tort claim is barred. Accordingly, Plaintiff's intentional tort claims (Counts X—XI & XIII) are dismissed for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

C.

Several of the remaining claims asserted by the Plaintiff are not based on Title VII or the ADEA: violation of human rights laws (Count V); conspiracy to violate civil rights (Count VI); aiding and abetting violations of civil rights laws (Count VII); obstruction of official process (Count VIII); abuse of administrative power (Count IX); obstruction of justice. *(See* Pl.'s Compl. ¶135—54). Defendants claim that these causes of action should be dismissed because the counts are based on allegations of employment discrimination,

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Opp'n p. 7 ("Plaintiff specifically requested [the Office of Special Counsel] to start criminal investigation of perjuries committed by agency witnesses and criminal tampering with evidence and misconduct of Defendant Caron"); Pl.'s Aff ¶ 80 ("I documented in my EEO discrimination complaints and in the OSC disclosure acts that evidence of conspiracy by the agency officials Mr. Jebsen, Mr. King, Mr. Davies, Mr. Fancy, Mr. Caron and others to commit prohibited personnel practice, intentionally discriminate against me subjecting me to deprivation of my rights. .. ."); Pl.'s Compl. ¶ 27 ("On September 27, 2005, the EEOC-OFO notified Plaintiff of his right to file a civil action against Gordon R. England.. . .").

and Plaintiff's exclusive remedies for such claims are Title VII and the ADEA. (Def's Mem. Supp. Mot. 13—14).

The Supreme Court established that Title VII is "the exclusive individual remedy available to a federal employee complaining of job-related [] discrimination." *Brown v. General Ser's. Admin.,* 425 U.S. 820, 835 (1976). Counts have held that the exclusive remedy applied in *Brown* applies to both national origin and retaliation claims under Title VIT and age-based discrimination claims under the ADEA. *See, e.g., Briones v. Runyon,* 101 F.3d 287, 289 (2d Cm. 1996) (national origin); *White v. Gen. Ser's. Admin.,* 652 F.2d 913, 917 (9th Cir. 1981) (retaliation); *Paterson v. Weinberger,* 644 F.2d 521, *525 (5th* Cir. 1981) (age). Further, federal employees are barred from bringing non-Title VII claims "when the gravamen of the complaint arises from employment discrimination." *White v. Coates,* 1999 WL 1489198, *2 (D. Md. Dec. 16, 1999).

In the case at bar, Plaintiff's causes of action *not* asserted under Title VII or the ADEA actually arise from allegations of employment discrimination based on national origin, age, on retaliation. For example, Plaintiff's "Human Rights Law" claims are based on the allegation that:

> Defendant Petri and Defendant Behrle in conspiracy with Defendant Jebsen, Defendant Wilson, Defendant Farley, and Defendant Canon discriminated against the Plaintiff Dr. A. Stoyanov on account of his national origin and/or age in violation of his right to equal employment opportunity as protected by the Human Rights Law, § 296 *et seq.* (P1. 's Comply. ¶ 136.) Plaintiff's other non-Title VII and

non-ADEA claims are also based on very similar allegations of employment discrimination.[8] Because the gravamen of Plaintiff's claims arise from his employment discrimination claims based on national origin, age, and retaliation, Plaintiff's exclusive remedies are Title VII and the ADEA.

For the reasons stated above, Counts V—TX & XII are dismissed for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6).[9]

D.

Defendants present two reasons for the Plaintiff's whistleblower claims to be dismissed or, in the alternative, judgment entered in favor of Defendants. First, Defendants maintain that Plaintiff's claims are not cognizable under Title VII because Title VII only protects employees against retaliation based on claims of discrimination. (Def's Mem. Supp. Mot. 14); *see Simmons v. Shalala,* 946 F.

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[8] *See* Pl.'s Compl. ¶ 140 (employment discrimination allegations form the basis of Plaintiff's cause of action for conspiracy); *Id.* ~ 45 (aiding and abetting); *Id.* ¶ 150 (obstruction of official process); *Id.* ¶ 153 (abuse of administrative power); *Id.* ¶ 156 (intentional infliction of emotional distress); *Id.* ¶ 159 (fraud and misrepresentation); *Id.* ¶'J 168—71 (obstruction of justice); *Id.* ¶175—80 (malicious abuse of process).

[9] The exclusive remedy of Title VII and the ADEA would also apply to Counts X—XI & XIII of Plaintiff's Complaint: if this Court had not dismissed those intentional tort claims for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(l).

Supp. 415,420 (D. Md. 1996) (Nickerson, J.) (ruling that a whistleblower retaliation claim regarding fraud and mismanagement "is not cognizable under Title VII which only protects against retaliation for claims of discrimination") (citing *Jamil v. Sec ~y, Depart. of Defense,* 910 F. 2d. 1203, 1207 (4th Cir. 1990)). Second, Defendants maintain that Plaintiff failed to establish the elements necessary to seek protection under the Whistleblower Protection Act ("WPA"). Specifically, Defendants claim that Plaintiff failed to establish that he made a protected disclosure that was a contributing factor in the Navy's decision to terminate him. (Def 's Mem. Supp. Mot. 15); 5 U.S.C. § 2303(b)(8); 5 U.S.C. § 1221 (e)(1).

In response, Plaintiff claims that his "Whistleblowing disclosures and participation in protected EEO activity" were contributing factors in his removal. (P1.'s Opp'n 9). "To state a claim of retaliation under Title VII, plaintiff must at least allege that the defendant retaliated against [him] on account of [his] whistleblowing *and* that [his] whistleblowing was in opposition to conduct or practices violative of Title *VII. "Jamil,* 910 F.2d at 1207 (quoting *Theard v. United States Army,* 653 F. Supp. 536, 1545 (M.D.N.C. 1987) (citations omitted)).

Some of Plaintiff's alleged whistleblowing disclosures do not involve violations of Title VII. Instead, some of Plaintiff's disclosures involve allegations of fraud.[10] (Def's Mem. Supp. Mot Ex. 2, at

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[10] Plaintiff alleges that he sent an email to Defendant Petri, disclosing "violations of laws, rules, and regulations (Whistleblowing) that identified Defendant Jebsen's reprisal for exposing perjuries, fraud, and provi[di]ng discrimination during the first

34—35, 60—61; Ex. 7, at 129—3 1). Specifically, Plaintiff alleged that Defendant Farley engaged in fraud by falsifying a time card and overcharging a project. *Id;* (Pl.'s Compl. ¶ 74). The Fourth Circuit has emphasized that "Title VII is not a general 'bad acts' statute; it only addresses discrimination on the basis of race, sex, religion, and national origin, not discrimination for whistleblowing." *Jamil*, 910 F.2d at 1207 (citing *Holder v. City of Raleigh*, 867 F.2d 822, 827—28 (4th Cm. 1989). Therefore, Plaintiff's whistleblowing claims involving fraud are not cognizable under Title VII.

Plaintiff did not sufficiently respond to Defendants' argument that Plaintiff failed to establish that he made a protected disclosure that was a contributing factor to Plaintiff's termination. Instead, Plaintiff makes a conclusory assertion that he "established the nexus between [his] Whistleblowing disclosures and the adverse action of unlawful removal," without presenting any supporting evidence.[11] (Pl.'s Opp'n p. 8). Title 5 U.S.C. § 122 1(e)(1)(A)—(B), provides that a plaintiff may demonstrate that his disclosure was a contributing factor in an adverse personnel action through "circumstantial evidence, such as evidence that (A) the official taking the personnel action knew of the disclosure; and (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action."

EEO Commission case." *Id.*

[11] Plaintiff states that "[a]ny reasonable person will conclude that the Whistleblowing disclosures and participation in protected EEO activity were the contributing factors in the removal of Plaintiff from his position and Federal services." *Id.*

If a plaintiff establishes the aforementioned elements, the burden shifts to the employer to "demonstrate by clean and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." *Id.* § 121 1(e)(2). Even if Plaintiff is able to proffer circumstantial evidence that his whistleblowing disclosures were a contributing factor to his termination, Defendants have sufficiently established that they would have discharged Plaintiff in the absence of Plaintiff's whistleblowing disclosures. The record clearly indicates that Plaintiff had several disciplinary problems.[12] As indicated by the Notice of Removal issued to the Plaintiff, the Navy's reasons for discharging the Plaintiff involved Plaintiff's disciplinary problems. Moreover, Plaintiff does not refute or deny his alleged negative conduct.[13]

For the above reasons, Defendants are entitled to judgment as a matter of law with respect to Plaintiff's claims brought under the Whistleblower Protection Act.

E.

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[12] The Notice of Proposed Removal charged Plaintiff with failing to follow instructions on three separate occasions and using offensive, abusive, and disrespectful language toward Plaintiff's supervisor. (Def 's Mem. Supp. Mot Ex. 1, Ex. F-2 at 60—62). Additionally, the Notice listed the following previous disciplinary actions taken against Plaintiff: (1) Nov. 25, 2002 Letter of Reprimand for Failure to Follow Instructions and Disrespectful Conduct; (2) Eight-Day Suspension for Failure to Follow Instructions and Absence without Leave effective on Sept. 8, 2003. *Id.*

[13] *Id*

Defendants contend and this Court agrees that Plaintiff cannot sustain a claim for employment discrimination with direct evidence. In the absence of direct evidence, this Court must apply the well established three-step burden-shifting model of circumstantial evidence of discrimination set forth in *McDonnell Douglas Corp. v. Green* to Plaintiff's remaining discrimination claims. 411 U.S. 792, 802(1973). Although *the McDonnell Douglas* burden-shifting model was established in a Title VII case, this Count has applied the same analysis to claims brought under the ADEA for age-based discrimination. *See, e.g., Caussade v. Brown,* 924 F. Supp. 693, 698 (C'. Md. 1996), *aff'd,*107 F.3d 865 (4th Cir. 1997); *Lovelace v. Sherwin-Williams Co.,* 681 F.2d 230,239(4th Cir. 1982). Therefore, Plaintiff's claims for employment discrimination on the basis of national origin and age are subject to the *McDonnell Douglas* burden-shifting model.

As set forth in *McDonnell Douglas,* to establish a cause of action for employment discrimination, a plaintiff must first demonstrate a prima facie ease of discrimination. 411 U.S. at 802. If the plaintiff establishes a prima facie case of discrimination, the burden shifts to the "employer to articulate some legitimate, nondiscriminatory reasons" for the employer's adverse employment action. *Id* However, the Fourth Circuit has emphasized that "Title VII is not a vehicle for substituting the judgment of a court for that of the employer." *DeJarnette v. Corning, Inc.,* 133 F.3d 293, 298 (4th Cm. 1998) (quoting *Jiminez v. Mary Washington ColL, 57* F.3d 369, 377 (4th Cm. 1995)). This Count should not act as a "super-personnel department weighing the prudence of

employment decisions made by firms charged with employment discrimination. *Id.* at 298—99 (internal quotations and citations omitted). Moreover, "when an employer articulates a reason for discharging the plaintiff not forbidden by law, it is not [this Court's] province to decide whether the reason was wise, fairn on even correct, ultimately, so long as it truly was the reason for the plaintiff's termination." *Id.* at 299 (quoting *Giannopoulus v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410(7th Cir. 1997)).

If the employer articulates a legitimate nondiscriminatory reason for the employer's adverse employment action, the ultimate burden shifts to the plaintiff to show that the employer's proffered reasons for the adverse action are pretextual. *E.g., McDonnellDouglas,* 411 U.S. at *804; Defarnett,* 133 F.3d at 299; *Williams v. Cerebonics, Inc.*, 871 F.2d245, 255 (4th Cir. 1989).

To establish a prima facie case of discriminatory discharge under Title VII and the ADEA, Plaintiff must establish that (1) he is a member of a protected class; (2) he suffered from an adverse employment action; (3) at the time his employer took the adverse employment action, he was performing at a level that met his employer's legitimate expectations; and (4) the position remained open on was filled by a similarly qualified applicant outside the protected class. *See, e.g., Oguezono v. Genesis Health Ventures Inc.*, 415 F. Supp. 2d 577, 586—87 (D. Md. 2005) (Bennett, *J.) (citing King v. Rumsfeld,* 328 F.3d 145, 149 (4th Cm. 2003)) (Title VII); *Miles v. Dell, Inc.*, 429 F.3d 480, 485 (4th Cir. 2005) (quoting *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 285 (4th Cm. 2004)) (en bane) (age). If a prima facie ease of discrimination is established, "an inference of discrimination arises that

may be rebutted by an employer on a showing of legitimate nondiscriminatory reasons for the dismissal." *Williams v. Cereberonics, Inc.*, 871 F.2d 452, 455—56(4th Cir. 1989) *(citing Smith v. Univ. of NC.*, 632F.2d316, 332—33(4th Cir. 1980)). Defendants concede that Plaintiff was a member of a protected class based on his national origin (Russian) and age (at the time of discharge Plaintiff was 47 years old). (Def's Mem. Supp. Mot., 18). Additionally, Defendants concede that Plaintiff suffered from an adverse employment action when he was discharged from his position as a Scientist at NSWCCD. *Id.*

However, Defendants assert, and this Court agrees that, as a matter of law, Plaintiff cannot satisfy the remaining two elements to establish a prima facie case of discriminatory discharge based on his national origin and age. *Id.* The record clearly demonstrates that Plaintiff was not meeting the legitimate expectations of his employer. At the time of his discharge, Plaintiff had many disciplinary problems. (Def's Mem. Supp. Mot., Ex. 1 at 60—63, 80, 92). Plaintiff failed to follow his employer's instructions and used offensive language toward his supervisor. *(Id.* Ex 1 at 60—63). Because Plaintiff had several disciplinary issues, he cannot be regarded as having met his employer's legitimate expectations. *See Demesme v. Montgomery County Gov 't,* 63 F. Supp. 2d 678, 683 (Legg, J.) (finding that a plaintiff did not meet the legitimate expectations of his employer because the plaintiff was disciplined after being involved in two disciplinary incidents and was terminated after a third incident). Therefore, the Court does not consider Plaintiff's performance to be at a level that met the Defendants' legitimate expectations.

(Additionally, Plaintiff's position was not filled by a similarly qualified applicant outside of his protected classes. According to the affidavits of Defendants Farley and Jebsen, Plaintiff's position had not yet been filled as of April 14,2004. (Def's Mem. Supp. Mot,, Ex. 1, Ex. F-7 at 80; Ex. 1, Ex. F-8 at 87). According to Defendant Wilson's affidavit, Plaintiff's position was initially filled by his twin brother, Yuni Stoyonav. *(Id.* at Ex. 1, Ex. F-9 at 93). Plaintiff's twin brother is of the same national origin and age as the Plaintiff, and thus is not outside of Plaintiff's protected classes. Either way, Plaintiff is unable to establish that his position was filled by a similarly qualified applicant outside his protected classes.)

Furthermore, even if Plaintiff is deemed to have established a prima facie ease, Defendants present legitimate and nondiscriminatory reasons for Plaintiff's dismissal. The record clearly demonstrates that Plaintiff was seriously disciplined on two separate occasions prior to his removal. *(Id* Ex. 1, Ex. F-2 at 61—62).[14] Additionally, Plaintiff was issued a Notice of Proposed Removal on October 6, 2003, where he was charged with failing to follow instructions on three separate occasions and using offensive, abusive, and disrespectful language toward his supervisor on one separate occasion. *Id* at 60—61. Based on the record of Plaintiff's disciplinary employment problems,

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[14] On November 25, 2002, Plaintiff was issued a letter of reprimand based on his failure to follow instructions and disrespectful conduct. (Def's Mem. Supp. Mot., Ex. 1, Ex. F-2 at 61). Beginning on September 8, 2003, Plaintiff served an eight-day suspension for failure to follow instructions and absence without leave. *Id.* at 6 1—62.

Defendants have made a sufficient showing of legitimate nondiscriminatory reasons for Plaintiff's dismissal. Accordingly, Defendants are entitled to judgment as a matter of law with respect to Plaintiff's claims for discrimination on the basis of national origin under Title VII and age under the ADEA (Counts I & III).

Plaintiff's retaliation claims fare no better. Plaintiff makes some retaliation claims that are very similar or identical to claims that Plaintiff alleged in a previous action. *See Stoyanov*, 2007 WL 2359771 at *13*17. These claims are the following:

Plaintiff was denied directly funded work from projects. *(See* Pl.'s Compl. ¶11 54 & 64—65).

Plaintiff was denied promotions, positions of higher responsibility, and employment opportunities leading to promotions. *Id* ¶11 55, 69.

These claims were thoroughly discussed and dismissed in a Memorandum Opinion issued by Judge Bennett and need not be discussed here.[15] *See*

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[15] Plaintiff also makes the following retaliation claims: (1) Defendant Jebsen interfered with Plaintiff s projects and "request[ed~ incompetent funding distribution." (Pl's Compl. ¶ 75); (2) Defendants denied Plaintiff the use of the government's facilities and equipment to work on his EEO complaints. *Id.* ¶ 81; (3) In September 2003, Plaintiff was suspended without pay for eight days. *Id.* ¶ 88; (4) On September 5, 2003, Defendant Farley requested security guards to escort Plaintiff from the office. *Id.* ¶ 89; (5) On September 22, 2003, Defendant Farley ordered Plaintiff to leave the office. *Id* ¶ 101; (6) In October 2003, Defendant Petri denied Plaintiffs request for access to classified information and later suspended Plaintiff from a

Stoyanov, 2007 WL 2359771 at *13*17

Plaintiff also alleges that Defendants terminated his employment for his protected EEO activity. (PL's Compl . ¶ 108). To prove a prima facie case of Title VII retaliation, Plaintiff must establish that (I) that he engaged in protected activity; (2) his employer took an adverse action against him; (3) a reasonable employee would have found the challenged action materially adverse; and (4) there was a causal connection between the activity and the challenged action." *Burlington N & S.F.R. Co. v. White,* 126 S. Ct. 2405,2415(2006); *Price v. Thompson,* 380 F.3d 209, 212 (4th Cir. 2004) (citation omitted).

In *Burlington,* the Supreme Court held that the Title VII anti-retaliation provision "covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant." 126 S. Ct. at 2409. The Court further explained that "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[16] *Id.*

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worksite and classified information. *Id* at ¶103; (7) Plaintiff was denied leave with pay for the time Plaintiff "worked or was on Administrative Leave since September 25, 2003 to December 2003." *Id* ¶ 107. The record clearly indicates that the Navy took these employment actions for legitimate and non-discriminatory reasons.

[16] In coming to its decision, the Supreme Court rejected the Fourth Circuit's prior holding that a prima facie case of Title VII retaliation requires a showing "that the challenged action must result in an adverse effect on the terms, conditions, or benefits of employment."

Defendants acknowledge that Plaintiff engaged in protected activity when he filed internal EEO complaints against the Navy, and that the Navy took an adverse action against Plaintiff by terminating his employment. (Def 's Mem. Supp. Mot. 20). However, Defendants assert that Plaintiff has not established a causal connection between his protected activity and the adverse employment action.[17] Plaintiff relies on the fact that Defendants knew of his EEO complaints to establish that there is causal connection between his protect EEO activity and his termination. (Pl.'s Opp'n 9). However, "[m]ere knowledge on the part of an employer that the employee it is about to fire has filed a discrimination charge is not sufficient evidence of a retaliation to counter the substantial evidence of legitimate reasons for discharging the employee *Simmons,* 946 F. Supp. at 420. In this case, Defendants' mere knowledge that Plaintiff filed EEO discrimination complaints is not sufficient evidence of retaliation because there is substantial evidence in the record that Defendants had legitimate and non-discriminatory reasons for Plaintiffs termination.[18] Further, Plaintiffs claim is unavailing because Plaintiff has failed to establish that the Defendants' proffered reasons for Plaintiffs termination are pretextual. *E.g., Wang,* 871 F.2d. 452, 457. The record indicates that Plaintiff had several disciplinary problems, refused to follow his supervisor's

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Burlington, 126 S. Ct. at 2410 (quoting *Von Gwen v. Maryland,* 243 F.3d 858, 866 (4th Cir. 2001).

[17] Plaintiff makes a blanket assertion that he "established the nexus between the Whistleblowing disclosures and the adverse action of unlawful removal" without presenting any supporting evidence. (Pl.'s Opp'n 8).

[18] *See supra,* text at 24.

instructions, and used offensive language towards his supervisor. (Def's Mem. Supp. Mot. Dismiss 6; Ex. I, Ex. F-2 at 60—63). Plaintiff does not deny these allegations. Instead, Plaintiff alleges that the Defendants are not credible and makes unsupported conclusory allegations that the Defendants' proffered reasons for the termination are pretextual. *(See* P1.'s Opp'n 15). But, Plaintiff has not provided any evidence that would support an inference of falsity. Therefore, Plaintiffs retaliation claims fails as a matter of law. *See Wang*, 871 F.2d at 457 (granting summary judgment to defendants where plaintiff failed to offer evidence that would support an inference of falsity regarding employer's proffered reasons for termination); *Rowe v. Marley Co.*, 233 F.3d 825, 830—3 1 (4th Cir. 2000) (holding that plaintiff failed to offer "any evidence that casts doubt on the veracity of [the employer's] proffered explanation for [plaintiffs] termination."). For the above reasons, Defendants' Motion for Summary Judgment on Count II is GRANTED.

V.

For the reasons stated above, Defendants' dispositive motion was GRANTED. Having reviewed Plaintiffs arguments in support of his motion for reconsideration, the motion shall be denied. An Order follows.

Filed: February *25*, 2008

/s/
Andre M. Davis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALEKSANDER J. STOYANOV,
Plaintiff

v. CIVIL NO. AMD 05-2819

GORDON R. ENGLAND, et al.,
Defendants

ORDER

For the reasons stated in a Memorandum Opinion shortly to be filed, it is this 28th day of September, 2007, by the United States District Court for the District of Maryland, ORDERED

(1) That the motion to dismiss or for summary judgment (Paper No. 9) is GRANTED; and it is further ORDERED

(2) That the Clerk of the Court shall TRANSMIT a copy of this Order to plaintiff pro se.

/s/
Andre M. Davis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALEKSANDER J. STOYANOV,
Plaintiff

v. CIVIL NO. AMD 05-2819

GORDON R. ENGLAND, et al.,
Defendants

MOTION TO RECONSIDER THE SEPTEMBER 28, 2007 ORDER AND AMEND THE JUDGMENT

Plaintiff, Aleksandr Stoyanov, submits this motion and respectfully requests to reconsider and amend the Order granting Defendants' motion to dismiss or for summary judgment dated September 28, 2007. Plaintiff's request is based on the following:

The current case was filed two years ago in October 2005, and by June 6, 2006 Order, the Plaintiff was required to supplement his complaint with a brief explanation as to why Plaintiff's complaints should not be consolidated with the previously filed actions. On May 9, 2007, Judge Bennett issued Memorandum Order placing the current case on the Inactive/Unassigned Docket until further notice of this Court pending resolution of Plaintiff's prior civil action RDB –05-1567. Plaintiff's objections and request to reconsider May 9, 2007 Memorandum Order was filed on May 15, 2007, and on May 25, 2007, Plaintiff amended the original complaint in the current case pursuant to Rule 15 of F. R. Civ. P., because the leave to amend "shall be freely given when justice so requires." Plaintiff amended the original complaint prior to any reassignment of the case to the active docket. Defendants did not respond to the amendments in the Plaintiff's complaint. On 15 August 2007, Judge Bennett ordered the current case 05-2819 to be placed back on the active docket.

The Defendants Representative Mr. Sippel failed to respond to the Plaintiff's amended complaint and Plaintiff contacted Mr. Sippel with regard to the response to the amended complaint on October 26, 2007. On October 29, 2007, Mr. Sippel informed

Plaintiff that Judge Davis dismissed the case on September 28, 2007. Plaintiff did not receive from the Court any notice or an order that the case was reassigned from Judge Bennett to Judge Davis. Furthermore, Judge Davis' September 28, 2007 Order was not mailed to the Plaintiff.

On October 31, 2007, Clerk of the Court acknowledged that the September 28, 2007 Order was not sent to the Plaintiff and explained that Judge Davis personally filed the Order. Apparently no one in the Clerks' office was notified about the September 28, 2007 Order. The Clerk assured Plaintiff that a notice would be made in the case on the Docket entries that the September 28, 2007 Order was not mailed to the Plaintiff. The Clerk also assured the Plaintiff that a copy of the September 28, 2007 Order would be mailed to the Plaintiff. On November 3, 2007, Plaintiff received a copy of the September 28, 2007 Order.

Consequently, Plaintiff respectfully requests that the Court waive the time limit to file Motion to Reconsider the September 28, 2007 Order and Amend the Judgment because Plaintiff did not receive the September 28, 2007 Order until November 3, 2007. In addition, Rule 56(f) provides the district court with the discretionary authority to deny a motion for summary judgment where the nonmoving party demonstrates that Plaintiff did not have adequate discovery or need additional time to complete it. See Fed. R. Civ. P. 56(f) ("Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other

order as is just"). The declaration attached to this motion shows that the record in this case is deficient. Plaintiff respectfully requests continuance to conduct discovery and time to complete discovery essential for this case.

Wherefore, in consideration of the above, I respectfully request to deny Defendants' motion to dismiss or for summary judgment and grant continuance to conduct discovery in this case.
Respectfully submitted

Aleksandr Stoyanov
7560 Pindell School Rd
Fulton, MD 20759
Phone (301) 604 – 7615.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALEKSANDER J. STOYANOV,
Plaintiff
v. CIVIL NO. AMD 05-2819

GORDON R. ENGLAND, et al.,
Defendants

DECLARATION OF ALEKSANDR J. STOYANOV

In support of Plaintiff's Motion to Reconsider the September 28, 2007 Order and Amend the Judgment, Aleksandr J. Stoyanov declares, pursuant to 28 U.S.C. §1746, as follows:

1. I am the Plaintiff in this case pro se and was unaware that there was an order issued by Judge A. M. Davis granting Defendants' motion to dismiss or for summary judgment on September 28, 2007, until

Defendants' Representative Mr. Sippel informed me on October 29, 2007.

2. On October 31, 2007, the Clerk of the Court informed me that the September 28, 2007 Order was not mailed to the Plaintiff in September 2007. The Clerk informed me that a notice would be made in the case stating that Plaintiff called the Court regarding the case on October 31, 2007.

3. Plaintiff's Motion to Reconsider the September 28, 2007 Order and Amend the Judgment is necessary because the record is deficient and there was no discovery ordered by the Court in this case. As a result, I must supplement the record in this civil action with the facts using discovery and those facts available to me during the administrative process, which was limited in its scope.

I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

November 5, 2007
Date

/s/
Aleksandr J. Stoyanov